In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PLAINTIFF IN error,
v.
THE ST. ANTHONY RAILROAD COMPANY. } No. 147.

BRIEF IN BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The precise question involved in this case is whether lands lying from 17 to 23 miles by "air line" from the St. Anthony Railroad Company's right of way are "adjacent lands" within the meaning of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." (18 Stat., 482.) The facts in the case are substantially as follows:

On the 18th of May, 1899, the St. Anthony Railroad Company was duly incorporated under and pursuant to the laws of the State of Idaho for the purpose of constructing, owning, maintaining and operating a steam railroad, extending from the town of Idaho Falls in Bingham County,

Idaho, to St. Anthony, in Fremont County, in said State, *a distance of approximately 40 miles.*

On the 7th of July, 1899, the board of directors of the defendant company adopted as the route for said railway the line then surveyed and located by defendant's engineer and shown upon the maps then presented, which line of right of way is the same as that upon which the defendant's said railway was afterwards actually built, and upon which the same is now actually maintained and operated, and is practically a straight line between said town of Idaho Falls and said town of St. Anthony. This right of way so surveyed and adopted passed through and over certain public lands belonging to the United States, and on July 7, 1899, the railroad company filed in the local land office at Blackfoot, Idaho, a copy of the articles of incorporation and due proofs of its organization; also maps of said right of way, together with certificates and affidavits as required by law and the rules and regulations of the General Land Office, all of which were thereafterwards filed with the Secretary of the Interior at Washington on or about the 19th day of July, 1899, and by him approved October 4, 1899.

It is not denied by the Government that the defendant company fully performed all things required of railroad companies by the act of Congress granting to railroads right of way through the public lands of the United States, approved March 3, 1875, and that said company became and is en-

titled to the benefits and privileges granted by said act of Congress to railroad companies.

For the purpose of procuring the necessary material with which to construct said railroad from Idaho Falls to St. Anthony, the defendant company entered into a contract with the Thompson Mercantile Company, a corporation, of St. Anthony, Idaho, by the terms and conditions of which the said Mercantile Company was to furnish to defendant railroad company at the times and in the manner agreed upon, ties and timber of dimensions suitable for the construction of said railroad as specified in the contract; that the ties and timbers were to be used and were used solely for the purpose of the original construction of said railroad, and the said Mercantile Company was by the express terms of the contract appointed as the agent of the railroad company, and in that capacity was authorized to cut timber for such purpose and no other from the public lands of the United States described in the complaint, which lands were situated from 17 to 23 miles by air line from the company's right of way.

During the summer and fall of 1899, under and pursuant to such contract, and acting as the agent of the defendant railroad company, the Thompson Mercantile Company entered upon the lands of the United States described in the complaint and cut and removed trees and timber standing and growing upon said lands, amounting in the aggregate to 1,682,975 feet, board measure, which said timber

was thereafter duly delivered to the said railroad company and by it used in the original construction of said road.

On the 24th day of August, 1900, the United States brought suit against said railroad company to recover the value of this timber, alleging that it had been unlawfully cut and removed from the lands of the United States, and unlawfully converted to the use of the railroad company, and that the value of the timber at the time of the institution of such suit was $21,469.70.

On the 13th of November, 1900, the railroad company filed its answer, in which substantially all the facts set forth in the complaint were admitted, but by way of justification alleged that the timber had been cut from public lands "adjacent" to defendant's line of road, and that the defendant company was entitled to such timber under and by virtue of the provisions contained in the act of Congress of March 3, 1875.

On January 1, 1901, an agreed statement of facts was filed in the case, the material portion of which is the following:

> Upon the issue of the "adjacency" of the lands upon which the timber in question was cut to defendant's railroad, where and in the construction of which said timber so cut was used, it is agreed that said lands from the place where said timber was used were and are the following distances, namely, from 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles follow-

ing the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of said timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could, with reasonable profit, be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges.

It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the lands and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefited thereby.

The case was heard on the 8th day of April, 1901, upon this agreed statement of facts, before Hon. James H. Beatty, United States district judge for the district of Idaho, and the sole question presented to the court for its consideration was whether the lands in question were "adjacent" to defendant's right of way, within the meaning of the act of March 3, 1875. The court held that under the facts in this case, as disclosed by the pleadings and stipulation these lands were adjacent within the meaning of that act, dismissed the suit, and ordered that judgment be entered in favor of the defendant company. The case was thereupon taken to the circuit court of

appeals for the ninth circuit, and that court, on the 3d day of March, 1902, affirmed the judgment of the circuit court. The case is here on writ of error to the circuit court of appeals for the ninth circuit for the purpose of reviewing that judgment.

SPECIFICATION OF ERROR.

That the circuit court of appeals for the ninth circuit erred in its decision, filed March 3, 1902, in holding that upon the stipulation and agreed statement of facts filed in the United States circuit court for the district of Idaho, as shown by the record herein, the public lands of the United States from which the timber in dispute was removed, as described and set forth in the complaint of the plaintiff in error, were public lands "adjacent" to the railroad's right of way of the defendant in error, within the meaning of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." (Record, pp. 15, 16, 17, and 18.)

THE LAW.

That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road; *also the right to take from the public lands adjacent to*

the line of said road material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each 10 miles of its road. (Act of Mar. 3, 1875, 18 Stat., 482, sec. 1.)

THE QUESTION OF LAW.

The question of law presented on this appeal is, whether lands lying from 17 to 23 miles distant by air line from the St. Anthony Railroad Company's right of way are to be considered public lands *adjacent* to the company's right of way, within the meaning of the act of Congress of March 3, 1875 (*supra*).

ARGUMENT, POINTS, AND AUTHORITIES.

The importance of this case to the Government can not be measured by the value of the timber which is involved in this suit. I do not exaggerate when I say that timber worth millions of dollars is the subject of suits now pending or about to be instituted by the Government in which the sole question at issue is the proper meaning of the word *adjacent* as used in this and similar acts of Congress. The Government has from the first contended that the word *adjacent* as used in this law has reference to a comparatively narrow belt

of public land situated on either side of the railroad company's right of way. In view of litigation now pending, and the great material interests involved, the Government feels especially called upon at this time to earnestly maintain that the word *adjacent* ought not to be construed as applicable to public lands more than two miles distant from a railroad company's right of way.

The Government's contention is that under the facts in this case the public lands from which the timber was cut and removed by the railroad company and its agents, and used by it in the construction of its line of road, were not *adjacent* lands within the meaning of said act of Congress.

It is of course a very difficult matter to determine just where "adjacency" terminates and "nonadjacency" begins within the meaning of this act of Congress, but it is manifest, and all courts agree, that lands within a few miles distant from a railroad are to be considered "adjacent lands." But beyond such distance there is great conflict among the decisions as to what lands should be considered adjacent, and as to what facts and circumstances are to be considered in each individual case for the purpose of determining whether lands can be considered as adjacent within the meaning of this law. The decisions seem to hold that each case as it arises must be determined from a consideration of its own peculiar facts. We will, therefore, briefly review the peculiar facts in

this case as disclosed by the pleadings and the stipulation.

The St. Anthony Railroad is approximately 40 miles in length, and practically a straight line of road connecting the town of Idaho Falls with St. Anthony, in the State of Idaho. The timber cut and appropriated by the railroad company from the public lands of the United States was cut from lands situated from 17 to 23 miles by "air line" from the defendant's right of way. It appears that the greater portion of the timber so appropriated by the company, was rafted down a river and that the remaining portion was hauled over a wagon road. It is admitted by the Government that the lands from which this timber was cut were materially and directly benfited by the building of the railroad, and that the timber could have been hauled at a reasonable profit from the place where it was cut to the place where it was used upon the company's right of way for ties and bridges.

The question arises upon this state of facts as to whether these lands are "adjacent" within the meaning of the act of March 3, 1875. The Government's contention is that they were not, for the reason that they were so far distant from the right of way that the court should say, as a matter of law, that they were not adjacent within the meaning of that act; and that the mere fact that the lands were directly and materially benefited by

the railroad, and that the timber was within such distance from the right of way that it could be hauled with a profit, is immaterial in cases of this character; that such facts can only be resorted to by the courts (if at all) when the lands are located so near to the right of way that it is difficult to determine where adjacency leaves off and nonadjacency begins. Or, to put the question in another way, suppose that the timber had been cut on lands from 50 to 100 miles distant from defendant's right of way, and it should appear that the lands from which the timber was cut were directly and materially benefited by the railroad, and that the timber could have been hauled with a profit, would such facts be sufficient to characterize the lands as lands *adjacent* to the company's right of way within the meaning of the law?

I.

ORDINARY MEANING OF THE WORD "ADJACENT," AS DEFINED BY LEXICOGRAPHERS.

It is manifest that the word *adjacent* is a relative term and that in order to ascertain its true meaning in any given case resort must be had to the context and the character of the objects with reference to which the word is used.

(*a*)

Century Dictionary and Cyclopedia:

> (L. adjacere—to lie near—). Lying near, close, or contiguous; adjoining; neighboring, as a field *adjacent* to the highway.

"Sauntering . . . along the banks of the *adjacent* mill pond." Irving, Sleepy Hollow.

"Tribes which are larger, or better organized, or both, conquer *adjacent* tribes and annex them." H. Spencer, Prin. of Sociol., No. 448.

Adjacent, lying near, neighboring, but not necessarily in contact. New York and the towns *adjacent*.

"From the barge
A strange invisible perfume hits the sense
Of the *adjacent* wharfs."
Shak., A. and C., ii, 2.

(*b*)

Crabbe's English Synonyms.—Mr. Crabbe, in his English Synonyms classifies together *adjacent*, *adjoining*, and *contiguous*, and after giving the etymology of these words illustrates the difference between them in the following manner:

What is adjacent may be separated by the intervention of some third object.

"They have been beating up for volunteers at York, and the towns *adjacent*, but nobody will list." (Granville.)

What is adjoining must touch in some part, as "he happens to have an estate adjoining equal to his own."

What is contiguous must touch entirely on one side.

"We arrived at the utmost boundaries of a wood which lay *contiguous* to a plain." (Steel.)

Lands are *adjacent* to a house or a town; fields are *adjacent* to each other; houses *contiguous* to each other.

(*c*)

Bouvier's Law Dictionary, vol. 1, page 93:

Adjacent. Next to, or near. Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining. 1 Cooke, 128; 7 La. Ann., 76.

(*d*)

Black's Law Dictionary, page 36:

ADJACENT. Lying near or close to; contiguous. The difference between *adjacent* and *adjoining* seems to be that the former implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes.

(*e*)

Anderson's Dictionary of Law:

ADJACENT. (Latin, adjacere, to lie near.) Near, but not touching. Applied to lots is synonymous with contiguous. In another relation it might have a more extended meaning.

II.

FEDERAL CASES WHEREIN THE WORD "ADJACENT," AS USED IN THE ACT OF CONGRESS OF MARCH 3, 1875, HAS RECEIVED JUDICIAL INTERPRETATION AND CONSTRUCTION.

United States v. Denver and Rio Grande Railroad, 31 Fed., 886.

This case was decided in August, 1887. The parties *stipulated* that the timber was cut from *lands adjacent* to the line of railroad as it was then or afterwards constructed, and it does not appear from the opinion how near the lands from which the timber was cut were situated with reference to the railroad company's right of way. The question decided in that case was that the privilege granted to the railroad company by the act of March 3, 1875, did not include the right to take timber from public lands and transport it by rail to distant parts of the road for use in construction and repairs. In the course of that decision, however, Judge Hallett discussed the meaning of the word "adjacent," as used in that act of Congress. He said (p. 889):

> The word "adjacent" seems to be of flexible meaning, and to depend very much upon the context and the subject-matter to which it may be applied for its proper effect. As used in these acts, and with reference to the lands which may be taken for stations, sidetracks, etc., it has the sense of contiguous or adjoining, while in the preceding paragraph, and with reference to material for building the road, it is claimed, and with

reason, that it should have the larger sense of nearness without actual contact. In a standard dictionary an illustration of the larger meaning of the word is given in this form: "Things are *adjacent* when they lie near to each other without actually touching, as adjacent fields, adjacent villages," etc. It seems unreasonable to say that in this connection the word refers to the government subdivisions lying next the right of way, and if we should so declare it would be difficult to point out what subdivisions are meant.

Accepting the larger meaning of the word, the right to take timber from public lands, under these acts, extends naturally some distance from the right of way, and probably within ordinary transportation by wagon.

If we are to be guided in ascertaining the meaning of the word *adjacent* by the rule announced by Judge Hallett in that case, we are simply forced to determine another uncertain quantity, to wit, what public lands are within "ordinary transportation by wagon." What would be *ordinary* transportation by wagon in one locality might be *extraordinary* transportation in another locality, and it does not seem to us that we are aided very materially by this opinion in ascertaining what is the true meaning of the term "adjacency" by being compelled to resort to something else which is as indefinite as the term we are attempting to define. There is surely nothing in the act of Congress which would warrant a resort to such a method, and it seems to

us that the reason here thus early assigned has been accorded undue prominence in the subsequent decisions of the courts in ascertaining the meaning of this word. Why should we resort to *ordinary transportation by wagon* for the purpose of ascertaining the meaning of the word *adjacent*? Why not resort to transportation by rail or water? These methods of transportation were known to Congress at the time of the passage of the act, and why should one be resorted to more than another for ascertaining what the word *adjacent* means?

United States v. Chaplin, 31 Fed., 890.

This case was decided in August, 1887, two days after the decision by Judge Hallett in the Denver and Rio Grande case (*supra*). It appears that the material was taken from certain townships through which the road was constructed, and no question was raised but that such lands were adjacent to the line of road.

Judge Deady, however, took occasion, in the concluding paragraph of his decision, to construe the word *adjacent* as used in the act of Congress above referred to. He said:

> This material appears to have been taken from certain townships through which the road runs, and no question is made but that such lands are "adjacent" to the line of road. What is "adjacent" land, within the meaning of the statute, must depend on the circumstances of each particular case.

> Where the "adjacent" ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term "adjacent" ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefited by its construction.

Judge Deady was, therefore, of the opinion that in order to ascertain what lands were adjacent to the line of road, the court should look to the proximity of such lands to the line of road for the purpose of ascertaining whether such lands were directly and materially benefited by its construction.

This seems to also involve the question in much uncertainty, for the reason that it is a difficult and often an impossible question to determine whether lands are directly and materially benefited by a certain railroad. And again, lands lying at a considerable distance and even remote from the road may be directly and materially benefited by the construction of the road, and still in no sense be adjacent to the line of road within any ordinary meaning of that term. Take, for example, one of the transcontinental lines, where there are no other railroads within hundreds of miles of certain timber lands except the one particular road, which may be at a distance of 50 to 100 miles, and the lands may be directly and materially ben-

efited by reason of the construction of such road and enhanced very considerably in value, yet in no sense could such lands be said to be adjacent to the line of road within the meaning of this act of Congress.

Denver and Rio Grande Railroad Company, 8 Land Decisions, 41.

A short time after the rendition of the decisions in *United States* v. *Denver and Rio Grande Ry. Co.* and *United States* v. *Chaplin* (*supra*), this law received consideration at the hands of the Secretary of the Interior in a letter to the Attorney-General, dated January 10, 1889, in which he says (p. 43):

> The adjective "adjacent," by which word the lateral limits of the area upon which the railroad company is authorized to take material for the construction of its road is defined, is indefinite and uncertain in signification. It is recognized that it must mean something more than "adjoining." Nothing in the term itself necessarily implies that the lines of surveys shall be resorted to to define its extent. There is, however, nothing in this indefiniteness which, it seems to me, can authorize the view that timber or other material can be taken from public land so far away as may be reached by wagon transportation in a single day, or any other given period of time. That appears to be wholly an arbitrary view, and one not in accordance with the general idea which one would derive from the use of this

adjective, as applied to lands adjacent to the railroad right of way—a narrow line drawn across the country. It seems to me that a much more restricted limitation must have been within the intention of Congress in the use of that term. I find support to this idea in the use of the same word in another connection immediately preceding, in the act of 1872, which provides that the right of way shall be granted, "one hundred feet in width on each side of the track," and also, "such public lands *adjacent* thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station." A similar use of the word is also made in the act of 1875. This use of the word "adjacent" indicates a moderate right of appropriation of the public lands, which were conveniently contiguous to the right of way, and immediately accessible from it. I do not believe that it was the purpose of Congress, or that this Department ought to decide that a railroad company can range the public lands to secure material for the construction of its road, when it does not happen to exist on those lands which, in the ordinary acceptance of the phrase, would be regarded as "adjacent" to the right of way. It is perhaps necessary, for practical construction, to define some limit; and in acknowledgment of that necessity, and with a view to a proper protection of the interests of the Govern-

ment, I am of the opinion that it is as far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of "adjacency." In employing this word of flexible signification, "adjacent," to indicate the territorial limits of this privilege to the railroad company, Congress has thrown upon the Department the necessity of determining a meaning to that word and of laying down a rule thereon for the guidance of the subordinate officers and the companies; and, in view of all the facts and considerations applicable, it is believed the definition and rule given are fair and just, and legitimately to be adopted. I think it wiser and safer to pursue such a rule, subject as it is to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies.

It will thus be observed that Secretary Vilas thus early took issue with Judge Hallett in holding that the act authorized the taking of timber from public lands so far away as may be reached by ordinary wagon transportation, and characterizes such holding to be wholly an arbitrary view and not in accordance with the general idea which one would derive from the use of such adjective

in connection with a railroad right of way—a narrow line drawn across the country. Notice was thus early given by the Land Department, so far as was in its power to control railroad companies in the premises, that the Government would contend that the word *adjacent* as used in said act of Congress applied to the tier of sections through which the right of way extends, and perhaps an additional tier of sections on either side of the road in order to meet the idea of adjacency.

But see *Kootenai Valley R. R. Co.*, 28 L. D., 439.

Denver and Rio Grande Railway Company v. United States, 34 Fed., 838, Circuit Court, District of Colorado, May 10, 1888.

In this case there was an agreed statement of facts to the effect, among other things, that the lands from which the timber was cut were *adjacent lands*. Mr. Justice Brewer, in delivering the opinion in that case, said (p. 841):

> There is some dispute between counsel as to the questions that are involved in and presented by these facts. I shall not attempt to consider any that I do not think are fairly and clearly presented by the facts. The fourth paragraph stipulates that the lands from which the timber was cut were adjacent to the line of railway; hence I shall not stop to consider how near land must be to be adjacent, whether half a mile or 10 miles. I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is

> immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands—lands fifty or a hundred miles away; nor do I understand that the rule controlling the construction of ordinary public grants, to the effect that they are construed strictly against the grantee, does not apply to these grants.

This decision of Mr. Justice Brewer clearly intimates that the proximity of the lands to the railroad's right of way is a very material fact to be considered in ascertaining the meaning of the word adjacent. This case was afterwards affirmed by this court.

United States v. Denver and Rio Grande Railway Company, 150 U. S., 1.

Mr. Justice Jackson, in delivering the opinion of this court in that case, said (p. 11):

> By the agreed statement of facts it is admitted that the timber in question was taken from the public, unoccupied, unentered lands of the United States, which were located along, near, and adjacent to the line of the defendant's road. No question, therefore, can be raised as to the proper locality from which it was taken.

This language again shows that the court expressly reserved and pointed out the fact that the question as to what are *adjacent lands* was not open for consideration under the agreed statement of facts, and thus intimated that if such question had been left open for consideration, that the court would have considered the question of the proximity of the lands to the railroad company's right of way for the purpose of ascertaining whether they were lands adjacent within the meaning of the law.

United States v. Linde et al., 47 Fed., 297, Circuit Court, District of Montana, August 10, 1891.

This case was commenced in the district court of the third judicial district for the Territory of Montana, sitting for the trial and determination of causes arising under the Constitution and laws of the United States. The complaint alleged that the defendants, between the 1st of April, 1882, and the 1st of April, 1886, willfully and unlawfully, and without right, went upon the unsurveyed mineral lands of the United States which lie directly south of townships 3 and 4, in range 4 east, lying along the streams of Squaw Creek and Spanish Creek and the upper West Gallatin River, in Gallatin County, Mont. That said lands were 10 miles south of the surveyed lands, and extending along said streams for a distance of 30 miles; and that between said dates defendants cut, carried away, and converted to their own use about

4,700,000 feet of pine and fir and other kinds of timber, standing and growing upon said lands. The defendant claimed that he cut the timber under a contract with the Northern Pacific Railroad Company for the purpose of furnishing said company logs, railroad ties, bridge timber, and other timber for the construction of its railroad from the Yellowstone River in Montana Territory to the Mullan Pass in said Territory; and that the lands from which said timbers were cut were adjacent to the line of said railroad between said points. The United States replied to the new matter set up in the amended answer, denying that the timber cut and taken from the land mentioned in the complaint was cut or taken for the construction of any railroad adjacent to said lands; and denied that all of said timber was taken by said defendants or used for the construction of any railroad; and denied that the timber used in the Northern Pacific Railroad, and furnished by the defendant Linde, was used on that railroad or any railroad adjacent to the lands where the timber was cut. The defendant moved the court for a judgment on the pleadings, which motion was granted.

The whole question in that case turned upon the sufficiency of the reply. The defendant having alleged in his answer that the lands from which the timber was cut were adjacent to the line of road of the Northern Pacific Railroad Company. The court held that the reply of the United States

did not amount to a denial that the lands from which the timber was cut were adjacent lands within the meaning of the act of March 3, 1875. The court said:

> There being no denial in the replication but that the land from which the timber was cut *was adjacent* to the railroad, the denial that it was used in the construction of the railroad adjacent to such land raises no issue.

The court, therefore, held that the district court of the third judicial district of the Territory of Montana was right in granting the motion of the defendant for judgment on the pleadings in his favor.

United States v. Stone, 64 Fed., 667.

This case was decided by the circuit court of appeals for the ninth circuit on the 2d of October, 1894.

It appears from the record in that case that the timber was cut from land along the line of the Northern Pacific Railroad, *about 50 miles distant from the eastern end of the other roads*, which was the nearest point where available timber could be found. The trial court instructed the jury that such lands were not adjacent to the railroad company's right of way within the meaning of the act of Congress of March 3, 1875. The circuit court of appeals, in affirming the judgment of the circuit court for the district of Washington in that case, said:

> We are of opinion that under the facts presented in this case it could not fairly be said, under any reasonable construction of the language of the act, that the timber was taken from lands "adjacent to the line" of either of the roads in the construction of which it was used; that the court did not err in excluding the evidence of defendant's agency, and that the charge of the court, withdrawing this question from the jury, was not erroneous.

This case was subsequently taken to this court upon a writ of error.

Stone v. United States, 167 U. S., 178.

This court, in affirming the decision of the circuit court of appeals for the ninth circuit, speaking through Mr. Justice Harlan, used the following language with reference to the meaning of the word *adjacent* as used in the act of Congress of March 3, 1875 (p. 189):

> By the act of March 3, 1875 (18 Stat., 482, c. 152), Congress granted the right of way through the public lands of the United States to any railroad company duly organized under the laws of any Territory, except in the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of the road, "also the right to take from the public lands adjacent

to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

At the trial the defendant offered as evidence the appointment of the plaintiff in error, John H. Stone, as agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, claiming that said corporations, having been organized under the laws of the Territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, the proof showing "that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads." This evidence was excluded, and its exclusion is assigned for error. It appears from the record, as stated in the opinion of the circuit court of appeals, that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region almost entirely destitute of timber, and that the timber was cut from lands along the line of the Northern Pacific Railroad about 50 miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found.

The trial court, in its charge, thus interpreted the above act of 1875: "The act of

Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad, that the railroad company has a right to require the United States to provide them with material, or go upon distant lands and procure the material that they require. That is not the scope of the law, and so I have decided that adjacent lands means lands in proximity, contiguous to or near to the road, and that lands so far distant from the railroad and mentioned as lands in Kootenai County, Idaho, where it is claimed that railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration and releases you from any consideration in regard to it."

We concur with the circuit court of appeals in adjudging this to be a sound interpretation of the act of 1875. It is substantially the view expressed in *Denver and Rio Grande Railroad* v. *United States* (34 Fed. Rep., 838, 841), in which Mr. Justice Brewer said: "I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the land is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most

convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that if there be no timber on adjacent lands the grant reaches out and justifies the taking of timber from distant lands—lands fifty or a hundred miles away." Under this interpretation of the act of Congress, and under the facts of this case, it is clear that the timber was not taken from lands which, within the true meaning of that act, were adjacent to either of the roads in the construction of which it was used.

Bacheldor v. United States, 83 Fed., 986.

The decision in this case was rendered by the circuit court of appeals for the eighth circuit on December 13, 1897, about seven months after the decision of the Stone case (*supra*) by this court. But inasmuch as no reference is made to the Stone decision *in this court* by Judge Thayer in delivering the opinion of the circuit court of appeals in the Bacheldor case, it would seem that the decision in the Stone case *in this court* had escaped the notice of the circuit court of appeals.

The sole question presented by the record in the Bacheldor case was the meaning of the word *adjacent* as used in the act of Congress of June 8, 1872, which authorized the Denver and Rio Grande Railroad Company to take timber and materials for construction purposes from the public lands

adjacent to its line. The evidence in the case was that the timber in question was cut from land 21½ miles distant from the line of the Denver and Rio Grande Railroad, or about 25 miles distant therefrom by wagon road, and there was no timber nearer than that which had been taken on either side of that part of the road.

On the trial of the case the lower court instructed the jury, in substance, that the word or term "adjacent," as used and applied in the act of Congress referred to, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the Denver and Rio Grande Railroad runs; that, when the public lands are unsurveyed, the word "adjacent" meant relatively the same thing, as to limit of distance from the line or right of way; and that the word "township," as used in the court's instruction, meant an area of land 6 miles in extent north, south, east, and west, and was a legal subdivision, according to the official surveys, under the laws of the United States.

It appeared that the timber which had been cut by the defendant was outside of the limit of distance from the right of way that was defined by the court, and the defendant was convicted, and on appeal taken to the supreme court of New Mexico the appeal was affirmed by a divided court. (48 Pacific Reporter, p. 310.)

The circuit court of appeals for the eighth circuit, speaking through Thayer, circuit judge, said (p. 988):

> The use of the word "adjacent" is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which timber has been obtained for the construction of a railroad is near to or remote from the right of way. The inquiry whether it has been transported a considerable distance, or only a few miles, is always an important consideration. Probably no better or more reasonable test can be applied than that which was first suggested by Judge Hallett in *United States* v. *Denver & R. G. Ry. Co.* (31 Fed., 886, 889), namely, that timber should be regarded as adjacent to the right of way of a railroad, without reference to township or section lines, if it is within reasonable hauling distance by wagon. It is generally the case that timber suitable for railroad construction will not bear transportation by wagon from points remote from the established line of road, by reason of the expense incident to transporting it. If railroads, therefore, are limited in their right to take timber from the public domain to such timber standing on either side of their rights of way, as they can reasonably afford to haul by wagon from the place where it is cut, it is probable that they will realize the full benefit of the privilege which Congress intended to confer, and that the privilege will

not be abused. In a case which presents conditions like the one at bar, and in others which may arise, no court can say, as a matter of law, that a trespass was committed, because the timber was taken from a place 25 miles distant by wagon road from the defendant's right of way; but it should be left to a jury of the vicinage to determine, under instructions from the court such as we have substantially outlined, whether the right accorded by the statute was fairly exercised as Congress intended it should be or whether, by reason of the distance from which the timber in question was drawn, the defendant should be regarded as a trespasser. The judgment of the territorial court for the first judicial district of the Territory of New Mexico, and the judgment of the supreme court of the Territory of New Mexico as well, are both reversed, and the case is remanded to the territorial court for the first judicial district of said Territory for a new trial.

From this review of the Federal decisions it will be seen that this court has, in effect, held that lands situated 50 to 100 miles distant from a railroad company's right of way are not adjacent lands within the meaning of the law, while on the other hand the circuit courts of appeal for the eighth and ninth circuits have held that lands lying at a distance of 17 to 25 miles from a railroad company's right of way are adjacent lands within the

meaning of the law. The case at bar clearly presents to this court for the first time the question whether these decisions of the circuit courts of appeal for the eighth and ninth circuits are correct, and whether it can be said as a matter of law or fact that under even the most liberal interpretation of this statute, lands lying at so great a distance from a railroad company's right of way can be held to be *adjacent* lands within the meaning of the act of March 3, 1875.

The Government maintains that inasmuch as the precise meaning of this term as used in the statute is uncertain, it was the duty of the Land Department of the Government, having in charge the public lands of the United States, to place a reasonable interpretation upon the statute, and that this having been done in 1887 by Secretary Vilas, in which he held that two miles on either side of the railroad company's right of way embraced what should be understood as adjacent lands within the meaning of this law, that such interpretation being reasonable and sufficient to afford the railroad companies all the rights and privileges intended to be conferred upon them by the act of Congress above mentioned, that the courts will be reluctant to declare in favor of a larger and more extended interpretation of the law.

It also appears from the various decisions that the different courts have placed different interpretations upon the meaning of this phrase, some of the trial courts following the interpretation

and ruling of the Secretary of the Interior, while others have accepted a larger subdivision, to wit: townships, as including lands which may be said to be properly adjacent to the right of way, thus clearly showing that in the opinion of many the Secretary was right in his construction of the law; and on the other hand, one court (Judge Hoyt, in 29 Albany Law Journal, 24), I believe went to the extent of holding that lands 100 miles distant from the right of way should be considered within the idea of adjacency.

The circuit courts of appeals, however, in the two cases mentioned—the Bacheldor case and the case at bar—have held that the railroad companies were entitled to pass over three or four townships and cut timber from the public lands of the United States under the protection of this law. It seems to us that there can be no difference in principle between lands lying 25 miles and lands lying at a distance of 50 miles from the company's right of way, and that the mere fact that the timber can be hauled such distance at a profit, and that the lands from which the timber is cut is directly benefited by the construction of the road, are immaterial considerations.

JUDGE HALLETT'S REASON NOT APPLICABLE TO CASE AT BAR.

The reason assigned by Judge Hallett in the case of *United States* v. *Denver and Rio Grande Railroad Co.* (31 Fed., 886), and which has been referred

to very frequently in subsequent cases, is, that if the lands are so situated with reference to the right of way that the timber is *in ordinary hauling distance*, in such case the lands should be considered as adjacent to the right of way. It does not appear in this case that the timber was *within ordinary hauling distance*. It may have been an extraordinary haul, and still could have been hauled at a profit. It can hardly be contended that a haul of from 20 to 25 miles is within ordinary hauling distance. Such a haul is extraordinary, as the facts in this case tend to show. The greater portion of the timber, it is admitted, was rafted down the river to the company's right of way, and the remaining portion hauled by wagon. The fact that it is stipulated that the lands were materially and directly benefited should not be of controlling importance in this case, for it may be that lands hundreds of miles distant from a railroad might be so benefited, and yet in no sense would they be adjacent.

LENGTH OF DEFENDANT'S LINE OF ROAD.

In considering whether lands are adjacent to a particular railroad right of way, the length of the road might properly be considered. In this case we have a railroad scarcely 40 miles in length, and the assertion on the part of the railroad company of the right to cut timber from public lands throughout a tract of country 6 miles greater in breadth than the road extends in length, upon the

theory that all of such lands should be considered as adjacent lands within the meaning of the law. While it can not be maintained for a moment that the meaning of the word "adjacency" expands so as to embrace lands more remote from the railroad company's right of way, as the length of the road increases, it seems but fair to say that with reference to a road of this length, at least, lands 23 miles distant from the road by air line ought not to be regarded as within the idea of adjacency.

III.

STATE AUTHORITIES.

The word "adjacent" has received consideration at the hands of various State courts, but those authorities furnish us but little aid in construing the statute under discussion, for the reason that either the cases have not received very careful consideration upon this particular question, or have turned upon the peculiar state of facts presented. Of course all courts have held that the word *adjacent* means *near to* in *the neighborhood of*, or *at a convenient distance from*, some particular object. I shall, therefore, simply cite these cases, referring to only one or two as throwing some light upon the question here under discussion.

STATE CASES.

Henderson v. *Long*, 1 Cook, Tenn. (128).

Henderson v. *Long*, 11 Fed. Cases, 1084, No. 6354.

New York v. *Hartford*, 16 Hun., N. Y., 380.

Miller v. *Cabell*, 81 Ky., 184.

Camphill Borough, 142 Pa. State, 517.

In re Municipality for Opening Roffignac Street, 7 La., 76.

People v. *Schermerhorn*, 19 Barber, N. Y., 556.

People v. *Land Office Commissioner*, 135 N. Y., 447.

Saunders v. *N. Y. Central R. R. Co.*, 135 N. Y., 613.

Clapton v. *Taylor*, 49 Mo. Appls., 118.

Carrier v. *Schoharie Turnpike Co.*, 18 Johns, N. Y. 57.

Continental Imp. Co. v. *Phelps*, 47 Mich., 300.

Brooklyn R. R. Co. v. *Brooklyn*, 18 N.Y. Suppl., 876.

Kent v. *Perkins*, 36 Ohio State, 639.

In the case of the *Continental Imp. Co.* v. *Phelps* (*supra*), the facts were substantially as follows:

On the 29th of April, 1871, the improvement company was occupying and using the road of the Grand Rapids and Indiana Railroad Company, and Mr. Phelps was owner and proprietor of 160 acres lying away from the railroad and separated from it by a quarter section of uninclosed lands. He lived about a mile and a half from the railroad and owned no land situated nearer to it than the 160 acres just mentioned. There was no fence or other obstruction sufficient for partition fences on either side of said railroad. On the day mentioned a yoke of oxen, the property of Mr. Phelps, strayed

on the track, and in the evening a passenger train encountered them on it, away from a highway crossing, and ran against and so injured them that they were worthless, and one died soon after and the section foreman killed the other.

> By act No. 33 of the session of 1869 (Laws 1869, vol. 1, p. 49), to amend section 43 of the general law of 1855, the duty to construct fences was enjoined, and neglect was visited with liability in favor of persons damnified, without reference to whether their possessions bordered on the railroad or not; and this regulation was in force when the cattle were killed on the 29th of April, 1871, unless it was done away with by the law of 1871, which took effect on the 18th of April, or eleven days before the accident. By the act last mentioned (Laws 1871, vol. 1, p. 328), "to revise the laws providing for the incorporation of railroad companies," the duty to fence was equally imposed; but instead of making the liability of neglect the subject of an action by any person suffering loss, without regard to whether their places did or did not adjoin the railroad, as was done by the act of 1869, it extended the liability no further than to a specific class, namely, to "*adjacent occupants or proprietors.*"

It therefore became pertinent for the court to determine whether within the meaning of the act of 1871 Mr. Phelps was an adjacent occupant or proprietor. And it was held by the court that he was not.

In the case of *Henderson* v. *Long* (*supra*) the circuit court for the eastern district of Tennessee in 1812 had occasion to construe an act of the legislature of North Carolina, which directed that the lands in controversy should lie adjacent to the military boundary line. It was surveyed 10 or 15 miles from the boundary line. The court said:

> The North Carolina legislature authorized Alexander Martin, under whom the lessor of the plaintiff derives title, to enter 2,000 acres of land *adjacent* to the military boundary. It does not seem to the court that the legislature intended by this expression to compel Martin to adjoin the line. *Adjacent*, strictly speaking, does not mean *adjoining;* it means that it shall be *in the neighborhood*, or *convenient*, or *near to* the place mentioned in the act. The act did not make a location of the land; it only in substance required that when it was made it should lie *near to* the military boundary line.

ENGLISH CASES.

Kimberley Water Works, *appellant*, v. *De Beers Consolidated Mines*, *respondents*, 66 L. J. P. C., 108.

Birmingham v. *Allen*, 46 L. J. C. H., 673.

Darley Main Co. v. *Mitchell*, 11 Appls. cases, 142.

Rex v. *Hodgkins*, M. & H., 341.

Regina v. *Brown*, 17 Q. B., 839.

In the *Kimberley Water Works Company* v. *De Beers Consolidated Mines* (*supra*), the precise ques-

tions involved arose on the construction of an agreement made in 1888 between the Kimberley Water Works Company and the De Beers Consolidated Mines. The second clause of the agreement was as follows:

> That the said Kimberley Water Works Company (Limited) shall, from and after the first day of December, eighteen hundred and eighty-eight, supply and continue to supply the mining companies and persons engaged in mining the Kimberley and De Beers mines with water for their mining purposes at the price of eight pence per one hundred gallons, and shall from time to time as any mining companies or mining properties in the Dutoitspan or Bultfontein mines, or mines *adjacent thereto*, are acquired by purchase, hire, or otherwise, or become amalgamated with the De Beers Consolidated Mines (Limited), supply and continue to supply such companies and properties with water for their mining purposes at the price of eight pence per one hundred gallons.

In December, 1891, the De Beers Consolidated Mines purchased a farm upon which there was a mine called the Premier Mine. Large quantities of underground waters accumulated in the said mine. The De Beers Consolidated Mines claimed a right under the proviso of section 6 of the agreement to use for mining purposes the water made by the Premier Mine. This mine was situated *about 4 miles distant from the De Beers Mine*, and

was outside the municipality of Kimberley. While it was not argued on behalf of the De Beers Consolidated Mines that the Premier Mine was "adjacent," within the meaning of the second clause of the agreement, Lord Morris, in delivering the judgment of their lordships, said:

> Paragraph 2 contemplated the purchase of mines by the respondents, and, although *the Premier Mine is not adjacent, within the meaning of paragraph 2*, and the appellants consequently are not bound to supply it, by paragraph 6 the respondents are entitled to obtain all water from the mines, and there is no limitation of "the mines" to the mines in existence at the time of the agreement.

While none of these cases are of much assistance in ascertaining the precise meaning of the word *adjacent*, as used in the act of Congress of March 3, 1875, they nevertheless serve to illustrate and emphasize the fact, which must be apparent, that the word *adjacent*, when used in any particular context, must receive a reasonable construction and one which will protect the interests of all parties concerned. It does not mean that a license is thus given to put such a construction upon the word as would embrace matters not reasonably contemplated by the parties. And while it is a term which is susceptible of different constructions and may, under the particular facts in each case, convey to different minds different ideas as

to distance, the idea conveyed must in every instance be that of "proximity" or "nearness," that which is far distant or remote being necessarily excluded.

CONCLUSION.

If the lands from which the timber which is the subject of this suit were adjacent to the right of way of the St. Anthony Railroad within any fair and reasonable interpretation of this law, it is far from the purpose of the Government to seek to deprive the company of the benefits of the act. The Government seeks at the hands of this court a decision which will serve as a guide in future cases to the Land Department in determining how far a railroad company may with propriety go from its line of road upon the public domain and cut timber for use in the construction of its road and still claim the protection of this act of Congress. The question at the present time is involved in great obscurity, and depends for its interpretation upon the various conflicting decisions of the courts. The Land Department and several of the Federal courts, have spoken in favor of a comparatively narrow belt of land upon either side of the right of way as the only lands within the idea of adjacency. This court, in one of its decisions, has strongly intimated that it favors such an interpretation of the law. The decisions of the circuit courts of appeal, however, have, in

our opinion, included lands at such a great distance and so remote from the right of way as to give little, if any, effect to the plain, ordinary, and manifest intention of the law.

We assert, in conclusion, that if a railroad company be permitted to appropriate timber from the tier of sections lying on either side of its right of way, and embracing a belt of land 2 miles in width, that all the benefits intended to be secured to such railroad company by this act of Congress would be realized; but in order to give to railroad companies the benefit of any doubt, the Government is willing to concede that a railroad company may cut timber under the protection of this law from the second tier of sections, thus embracing a belt 4 miles in width, which, in our judgment, will secure to the railroad company every possible right contemplated by the law. Such concession would permit the defendant in error to cut timber from public lands of the United States embracing an area of 160 square miles, or more than one hundred times greater in extent than the tract of land granted to the railroad company for a right of way. Can any concession be more reasonable? The defendant in error, under the facts in this case, in effect claims the privilege of cutting timber upon public lands embracing an area of 1,840 square miles, or more than twelve hundred times greater in extent than the lands granted to the company for the purpose

of constructing its road. We submit that such claim is unreasonable and not within any fair interpretation of the act, and that this court should say, as a matter of law, that the public lands from which this timber was taken by the railroad company and its agents were not adjacent public lands.

Respectfully submitted.

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